SUPREME COURT, U. S.

No. 73-269

OCT 2 1973

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HEART OF THE BLACK HILLS STATIONS, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

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Under Section 301 of the Communications Act of 1934, authorization from the Federal Communications Commission, under a public interest standard, is a prerequisite for transmission of television broadcast signals in the United States. See 47 U.S.C. 301. This authority must be renewed every three years. See 47 U.S.C. 307(d). The question presented is whether the court of appeals properly concluded that substantial evidence in the record supports the Commission's conclusion that repeated violations of the Commission's technical regulations by the licensee of two South Dakota television stations warranted the Commission's refusal to renew these licenses.

1. Petitioner, Heart of the Black Hills Stations, applied to the Commission in December 1967 for renewal

of licenses of television broadcast stations KRSD-TV, Rapid City, and KDSJ-TV, Lead, South Dakota. Since the licensee had received Official Notices of Violations of the Commission Rules and Regulations in 1966 and 1967, the Commission designated the renewal applications for hearing to determine the nature and extent of the violations.

The Hearing Examiner concluded (Pet. App. 26a-27a) that during 1966 and 1967, the stations operated in "substantial violation of the Commission rules." The Examiner found that during this period "hundreds of viewers complained to the Commission over the poor quality of the service they were receiving* * * " (Pet. App. 26a). Although the licensee was well aware of the technical steps necessary to improve service prior to the Examiner's final decision, "an inspection of the stations * * * found the stations still in substantial violation of the Commission rules" (*ibid.*). Although the Examiner found that "[w]ith such a background, it is not easy to find justification for renewal * * * * " (Pet. App. 26a), he nevertheless concluded that the licenses should be renewed for a period of one year.

On appeal the Commission adopted the Examiner's findings but concluded that the licensee's failure to provide adequate service to the communities served during a ten-year period "compelled * * * the conclusion that renewal is neither justified nor warranted in the public interest" (Pet. App. 5b). In the Commission's view, "[t]he number, nature and extent of the violations reflected in the record of this proceeding represent perhaps the most flagrant dereliction of a licensee's responsibility in the operation of its television stations that has yet to come before the Commission" (*id.*).

The court of appeals affirmed *per curiam*. It held that substantial evidence in the record supports the Commission's findings "* * * after almost a decade of repeated and serious violations of the Commission's rules and regulations governing the technical requirements for operation of broadcast stations * * *" and that the Commission had not abused its discretion in making its judgment (Pet. App. 1d-2d).

2. The issues presented turn essentially on the facts of this record. The Commission carefully examined the technical quality of service rendered by the licensee during the past ten years to determine whether the public interest would be served by renewal of the licenses, but found that service had been almost continuously inadequate. Inspections of Black Hills' facilities in 1961, 1966, 1967, 1969, and 1971 revealed serious and repeated violations of regulatory requirements designed to assure the public satisfactory operation. During the 1966 and 1967 inspections the Commission found "56 infractions of 33 separate rule violations" (Pet. App. 3b n. 3). This unsatisfactory record "had the cumulative effect of depriving the public of the very service for which the licenses were originally granted * * *" (Pet. App. 5b). In these circumstances, the Commission soundly exercised its administrative responsibility in concluding that the public interest would best be served by refusing to renew the licenses. See *Federal Communications Commission* v. *WOKO Inc.*, 329 U.S. 223, 229. The past performance of a station licensee is certainly the most informative basis upon which the Commission can render a judgment in the public interest. *Office of Communication of United Church of Christ* v. *Federal Communications Commission*, 359 F. 2d 994, 1007 (C.A. D.C.).

3. Petitioner's contention that the Commission's failure to grant its pending application for a new antenna prevented petitioner from solving its technical problems was first made in its petition for reconsideration and was properly rejected by the Commission (Pet. App. 13c). Despite its protestations that 1967 tornado damage to its antenna was the source of its problems, the record shows: (1) petitioner's technical deficiencies pre-dated the tornado damage (Pet. App. 3a-10a); (2) seven months elapsed after the tornado before petitioner filed an application for a new antenna (Pet. App. 11c); (3) no evidence was presented to the Commission to indicate that the antenna authorized on an interim basis was inadequate (Pet. App. 25c); and (4) many of Black Hills' problems were attributable to faulty transmission line supports which were first brought to the licensee's attention in 1961 and could have been replaced at any time for $500 (App. 45-54).[1]

4. Contrary to petitioner's contention (Pet. 10), no evidence was presented to the Commission to support the assertion that the quality of its television picture has improved to the point that it can assure network programming to Rapid City, thus making it unnecessary for the community to rely on cable television (CATV). As a result of petitioner's deficiencies, the Commission has waived CATV rules which would otherwise restrict CATV importing a distant signal in that area. The Commission's 1966 waiver was premised on a letter from the then operator of the CATV system, which alleged that the KRSD signal was "of [a] totally unusable quality" (Pet. App. 18c), and therefore inadequate for cable distribution purposes. Petitioner offered no comment in 1966 concerning this mat-

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[1] "App." refers to the joint appendix in the court of appeals.

ter.[2] Its only subsequent showing before the Commission was a private agreement by which the cable company withdrew its request for waiver of the restrictions. Nevertheless the agreement retained provisions permitting the CATV system to "assure a usuable network signal from a distant station *if KRSD was not providing a usable picture*" (Pet. App. 19c, emphasis added). The Commission properly rejected this statement as establishing that KRSD was now providing an acceptable signal.

The court of appeals has found the Commission's findings to be supported by substantial evidence in the administrative record. Further review of petitioner's evidentiary contentions is not warranted.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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JOHN W. PETTIT,
General Counsel,
Federal Communications Commission.

OCTOBER 1973.

CERTIORARI DENIED

[2] Although petitioner requested non-duplication protection in September 1966 (Pet. App. 5c), it offered no evidence in support of its request, and as the Commission inspection in 1969 revealed, poor picture quality continued (Pet. App. 8c).